

HOUSE BILL No. 1685

DIGEST OF INTRODUCED BILL

Citations Affected: IC 5-14-3-4; IC 22-5.

Synopsis: Employee personnel records. Provides that upon written request from an employee, an employer shall provide the employee with an opportunity to review the employee's personnel records on a periodic basis. Provides a procedure if the employee disagrees with the information contained in the personnel record. Prohibits an employer from gathering or keeping a record of an employee's associations, political activities, publications, or communications of activities outside employment, subject to certain exceptions. Provides that if an employer has reasonable cause to believe that an employee is engaged in criminal activity that may result in loss or damage to the employer's property or disruption of the employer's business operation, and the employer is engaged in an investigation, then the employer may keep a separate file of information relating to the investigation. Provides that a court shall award damages to the employee if the employer violates any of these provisions. Provides that information concerning findings of fact and decisions in which final action was taken and that resulted in the discharge or suspension without pay of a public employee is a public record.

Effective: July 1, 2003.

Liggett

January 21, 2003, read first time and referred to Committee on Labor and Employment.



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Introduced

First Regular Session 113th General Assembly (2003)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2002 Regular or Special Session of the General Assembly.

HOUSE BILL No. 1685

A BILL FOR AN ACT to amend the Indiana Code concerning labor and industrial safety.

Be it enacted by the General Assembly of the State of Indiana:

- 1 SECTION 1. IC 5-14-3-4, AS AMENDED BY P.L.1-2002,
- 2 SECTION 17, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
- 3 JULY 1, 2003]: Sec. 4. (a) The following public records are excepted
- 4 from section 3 of this chapter and may not be disclosed by a public
- 5 agency, unless access to the records is specifically required by a state
- 6 or federal statute or is ordered by a court under the rules of discovery:
- 7 (1) Those declared confidential by state statute.
- 8 (2) Those declared confidential by rule adopted by a public
- 9 agency under specific authority to classify public records as
- 10 confidential granted to the public agency by statute.
- 11 (3) Those required to be kept confidential by federal law.
- 12 (4) Records containing trade secrets.
- 13 (5) Confidential financial information obtained, upon request,
- 14 from a person. However, this does not include information that is
- 15 filed with or received by a public agency pursuant to state statute.
- 16 (6) Information concerning research, including actual research
- 17 documents, conducted under the auspices of an institution of

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higher education, including information:

(A) concerning any negotiations made with respect to the research; and

(B) received from another party involved in the research.

(7) Grade transcripts and license examination scores obtained as part of a licensure process.

(8) Those declared confidential by or under rules adopted by the supreme court of Indiana.

(9) Patient medical records and charts created by a provider, unless the patient gives written consent under IC 16-39.

(10) Application information declared confidential by the twenty-first century research and technology fund board under IC 4-4-5.1.

(11) The following personal information concerning a customer of a municipally owned utility (as defined in IC 8-1-2-1):

(A) Telephone number.

(B) Social Security number.

(C) Address.

(12) A photograph, a video recording, or an audio recording of an autopsy, except as provided in IC 36-2-14-10.

(b) Except as otherwise provided by subsection (a), the following public records shall be excepted from section 3 of this chapter at the discretion of a public agency:

(1) Investigatory records of law enforcement agencies. However, certain law enforcement records must be made available for inspection and copying as provided in section 5 of this chapter.

(2) The work product of an attorney representing, pursuant to state employment or an appointment by a public agency:

(A) a public agency;

(B) the state; or

(C) an individual.

(3) Test questions, scoring keys, and other examination data used in administering a licensing examination, examination for employment, or academic examination before the examination is given or if it is to be given again.

(4) Scores of tests if the person is identified by name and has not consented to the release of his scores.

(5) The following:

(A) Records relating to negotiations between the department of commerce, the Indiana development finance authority, the film commission, the Indiana business modernization and technology corporation, or economic development

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commissions with industrial, research, or commercial prospects, if the records are created while negotiations are in progress.

(B) Notwithstanding clause (A), the terms of the final offer of public financial resources communicated by the department of commerce, the Indiana development finance authority, the Indiana film commission, the Indiana business modernization and technology corporation, or economic development commissions to an industrial, a research, or a commercial prospect shall be available for inspection and copying under section 3 of this chapter after negotiations with that prospect have terminated.

(C) When disclosing a final offer under clause (B), the department of commerce shall certify that the information being disclosed accurately and completely represents the terms of the final offer.

(6) Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

(7) Diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal.

(8) Personnel files of public employees and files of applicants for public employment, except for:

(A) the name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency;

(B) information relating to the status of any formal charges against the employee; and

(C) information concerning ~~disciplinary actions~~ **findings of fact and decisions** in which final action has been taken and that resulted in the employee being ~~disciplined~~ **suspended without pay** or discharged.

However, all personnel file information shall be made available to the affected employee or his representative. This subdivision does not apply to disclosure of personnel information generally on all employees or for groups of employees without the request being particularized by employee name.

(9) Minutes or records of hospital medical staff meetings.

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(10) Administrative or technical information that would jeopardize a recordkeeping or security system.

(11) Computer programs, computer codes, computer filing systems, and other software that are owned by the public agency or entrusted to it and portions of electronic maps entrusted to a public agency by a utility.

(12) Records specifically prepared for discussion or developed during discussion in an executive session under IC 5-14-1.5-6.1. However, this subdivision does not apply to that information required to be available for inspection and copying under subdivision (8).

(13) The work product of the legislative services agency under personnel rules approved by the legislative council.

(14) The work product of individual members and the partisan staffs of the general assembly.

(15) The identity of a donor of a gift made to a public agency if:

(A) the donor requires nondisclosure of his identity as a condition of making the gift; or

(B) after the gift is made, the donor or a member of the donor's family requests nondisclosure.

(16) Library or archival records:

(A) which can be used to identify any library patron; or

(B) deposited with or acquired by a library upon a condition that the records be disclosed only:

(i) to qualified researchers;

(ii) after the passing of a period of years that is specified in the documents under which the deposit or acquisition is made; or

(iii) after the death of persons specified at the time of the acquisition or deposit.

However, nothing in this subdivision shall limit or affect contracts entered into by the Indiana state library pursuant to IC 4-1-6-8.

(17) The identity of any person who contacts the bureau of motor vehicles concerning the ability of a driver to operate a motor vehicle safely and the medical records and evaluations made by the bureau of motor vehicles staff or members of the driver licensing advisory committee. However, upon written request to the commissioner of the bureau of motor vehicles, the driver must be given copies of the driver's medical records and evaluations that concern the driver.

(18) School safety and security measures, plans, and systems,

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including emergency preparedness plans developed under 511 IAC 6.1-2-2.5.

(c) Notwithstanding section 3 of this chapter, a public agency is not required to create or provide copies of lists of names and addresses, unless the public agency is required to publish such lists and disseminate them to the public pursuant to statute. However, if a public agency has created a list of names and addresses, it must permit a person to inspect and make memoranda abstracts from the lists unless access to the lists is prohibited by law. The following lists of names and addresses may not be disclosed by public agencies to commercial entities for commercial purposes and may not be used by commercial entities for commercial purposes:

- (1) A list of employees of a public agency.
- (2) A list of persons attending conferences or meetings at a state institution of higher education or of persons involved in programs or activities conducted or supervised by the state institution of higher education.
- (3) A list of students who are enrolled in a public school corporation if the governing body of the public school corporation adopts a policy:
 - (A) prohibiting the disclosure of the list to commercial entities for commercial purposes; or
 - (B) specifying the classes or categories of commercial entities to which the list may not be disclosed or by which the list may not be used for commercial purposes.

A policy adopted under subdivision (3) must be uniform and may not discriminate among similarly situated commercial entities.

(d) Nothing contained in subsection (b) shall limit or affect the right of a person to inspect and copy a public record required or directed to be made by any statute or by any rule of a public agency.

(e) Notwithstanding any other law, a public record that is classified as confidential, other than a record concerning an adoption, shall be made available for inspection and copying seventy-five (75) years after the creation of that record.

(f) Notwithstanding subsection (e) and section 7 of this chapter:

- (1) public records subject to IC 5-15 may be destroyed only in accordance with record retention schedules under IC 5-15; or
- (2) public records not subject to IC 5-15 may be destroyed in the ordinary course of business.

SECTION 2. IC 22-5-3-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2003]: Sec. 1. (a) A person who, after having discharged any employee from his service, prevents the discharged

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employee from obtaining employment with any other person commits a Class C infraction and is liable in penal damages to the discharged employee to be recovered by civil action; but this subsection does not prohibit a person from informing, in writing, any other person to whom the discharged employee has applied for employment a truthful statement of the reasons for the discharge.

(b) An employer that discloses information about a current or former employee **in accordance with IC 22-5-6-9** is immune from civil liability for the disclosure and the consequences proximately caused by the disclosure, unless it is proven by a preponderance of the evidence that the information disclosed was known to be false at the time the disclosure was made.

(c) Upon written request by the prospective employee, the prospective employer will provide copies of any written communications from current or former employers that may affect the employee's possibility of employment with the prospective employer. The request must be received by the prospective employer not later than thirty (30) days after the application for employment is made to the prospective employer.

SECTION 3. IC 22-5-6 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2003]:

Chapter 6. Employee's Access to Personnel Records

Sec. 1. As used in this chapter, "employee" means an individual employed or permitted to work or perform any service for remuneration or under any contract of hire, written or oral, express or implied, by an employer in any occupation.

Sec. 2. As used in this chapter, "employer" means an individual, a partnership, an association, a limited liability company, a corporation, a business trust, the state, or other governmental agency or political subdivision with at least four (4) employees at a time.

Sec. 3. As used in this chapter, "personnel record" means a record kept by an employer that identifies the employee, to the extent that:

(1) the record:

(A) is used;

(B) has been used; or

(C) may be used;

to determine the employee's qualifications for employment, promotion, transfer, additional compensation, or disciplinary action; or

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(2) the record may affect the determination described in subdivision (1).

Sec. 4. For the purposes of this chapter, a personnel record includes a record in the possession of a person, a corporation, a partnership, or another association that has a contractual agreement with the employer to keep or supply a personnel record as provided in this article.

Sec. 5. For the purposes of this chapter, a personnel record does not include any of the following:

(1) Employee references supplied to an employer if the identity of the person making the reference would be disclosed.

(2) Materials relating to the employer's staff planning with respect to more than one (1) employee, including salary increases, management bonus plans, promotions, and job assignments.

(3) Medical reports and records made or obtained by the employer if the records or reports are available to the employee from the doctor or medical facility involved.

(4) Information of a personal nature about a person other than the employee if disclosure of the information would constitute a clearly unwarranted invasion of the other person's privacy.

(5) Information that is kept separately from other records and that relates to an investigation by the employer under section 12 of this chapter.

(6) Records limited to grievance investigations that are kept separately and are not used for the purposes provided in this chapter.

(7) Records maintained by an educational institution that are directly related to a student and are considered to be education records under the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232g.

(8) Records kept by an executive, an administrative, or a professional employee that are kept in the sole possession of the maker of the record and are not accessible or shared with other persons. However, a record concerning an occurrence or fact about an employee kept under this subdivision may be entered into a personnel record if entered not more than six (6) months after the date of the occurrence or the date the fact becomes known.

Sec. 6. (a) Upon written request that describes the personnel

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record, an employer shall provide the employee with an opportunity to periodically review, at reasonable intervals and not more than twice in a calendar year or as otherwise provided by law or a collective bargaining agreement, the employee's personnel record if the employer has a personnel record for that employee.

(b) The review must take place at a location reasonably near the employee's place of employment and during normally scheduled hours of employment for the employee. If an employee demonstrates that the employee is unable to review the personnel record at the employing unit or at a location reasonably near the employee's place of employment and during normal office hours, the employer shall mail a copy of the requested record to the employee upon the employee's written request.

Sec. 7. As part of or after the review provided in section 6(a) of this chapter, an employee may obtain a copy of the information or part of the information contained in the employee's personnel record. The employer may charge a fee for a copy provided under this section. The fee shall be limited to the actual cost of duplicating the information.

Sec. 8. (a) If there is a disagreement concerning information contained in a personnel record, removal or correction of that information may be mutually agreed upon by the employer and the employee.

(b) If an agreement is not reached under subsection (a), the employee may submit a written statement explaining the employee's position. The statement may not exceed five (5) sheets of eight and one-half (8 1/2) by eleven (11) inch paper. As long as the information over which there is a disagreement is included in the employee's personnel record, the statement shall be included with information contained in the personnel record if the information is divulged to a third party.

(c) If either the employer or employee knowingly places or causes to be placed in the personnel record false information, the employer or employee, whichever is appropriate, has a remedy through legal action to have that information expunged.

Sec. 9. (a) Personnel record information that was not included in an employee's personnel record but should have been included in the personnel record under this chapter may not be used by an employer in a judicial or administrative proceeding.

(b) In a judicial or an administrative proceeding, information that should have been included in the employee's personnel record under this chapter but was not included:

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(1) may be used by the employer if:

- (A) the employee agrees to the use of the information; or
- (B) the employee has been given a reasonable time to review the information; or

(2) shall be usable at the request of the employee.

Sec. 10. (a) An employer or former employer shall not divulge a disciplinary report, letter of reprimand, or other disciplinary action to a third party, to a party who is not a part of the employer's organization, or to a party who is not a part of a labor organization representing the employee without written notice to the employee as provided in this section.

(b) The written notice provided to the employee under subsection (a) must be by first class mail to the employee's last known address and shall be mailed on or before the day the information is divulged from the personnel record.

(c) This section does not apply if one (1) of the following occurs:

- (1) The employee has specifically waived written notice as part of a written, signed employment application with another employer.
- (2) The disclosure is ordered in a legal action or arbitration, and is made to a party in that legal action or arbitration.
- (3) The information is disclosed upon request by a government agency as a result of a claim or complaint by an employee.

(d) An employer shall review a personnel record before releasing information to a third party and, except when the release is ordered in a legal action or arbitration and is made to a party in that legal action or arbitration, shall delete:

- (1) disciplinary reports;
- (2) letters of reprimand; or
- (3) other records of disciplinary action;

that are more than four (4) years old.

Sec. 11. (a) An employer shall not gather or keep a record of an employee's associations, political activities, publications, or communications of activities outside employment, except if:

- (1) the employee submitted the information to the employer in writing; or
- (2) the employee authorized the keeping or gathering of the information in writing.

This prohibition on gathering or keeping records does not apply to records concerning the activities that occur on the employer's premises and during the hours when the employee is working for

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that employer and that interfere with the performance of the employee's duties or the duties of other employees.

(b) A record that is kept by the employer as permitted under subsection (a) shall be part of the personnel record.

Sec. 12. (a) If an employer has reasonable cause to believe that an employee is engaged in criminal activity that may result in loss of or damage to the employer's property or disruption of the employer's business operation and the employer is engaged in an investigation, the employer may keep a separate file of information relating to the investigation.

(b) The employee shall be notified that an investigation was or is being conducted of the suspected criminal activity under this section:

(1) upon completion of the investigation; or

(2) two (2) years after the investigation begins;

whichever comes first.

(c) If disciplinary action is not taken, the investigative file and all copies of the material in the file shall be destroyed upon completion of the investigation under this section.

(d) If the employer is a criminal justice agency (as defined in IC 5-2-4-1(c)) that is involved in the investigation of an alleged criminal activity or the violation of an agency rule by the employee, the employer shall maintain a separate confidential file of information relating to the investigation under this section. If disciplinary action is not taken, upon completion of the investigation the employee shall be notified that an investigation was conducted. If the investigation reveals that the allegations are unfounded or unsubstantiated, or if disciplinary action is not taken, the separate file must contain a notation of the final disposition of the investigation and information in the file shall not be used in any future consideration for promotion, transfer, additional compensation, or disciplinary action.

Sec. 13. This chapter shall not be construed to:

(1) diminish a right of access to records as provided in IC 5-14-3 or as otherwise provided by law; or

(2) conflict with IC 5-14-3-4(b)(8).

Sec. 14. If an employer violates this act, an employee may commence an action in a circuit or superior court to compel compliance with this act. A court with jurisdiction in:

(1) the county in which the employee resides;

(2) the county in which the employee is employed; or

(3) the county in which the personnel record is maintained;



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1 has jurisdiction to hear the matter.

2 **Sec. 15.** The court shall award an employee prevailing in an
3 action under this chapter the following:

4 (1) For a violation of this chapter, actual damages plus costs.

5 (2) For a willful and knowing violation of this chapter, an
6 amount equal to the weekly pay of the employee, computed at
7 the usual and customary rate of pay and the usual and
8 customary hours worked per week, plus costs, reasonable
9 attorney's fees, and actual damages.

10 In an action under this chapter, failure to comply with an order of
11 the court may be punished as contempt of court.

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